Affirmed and Opinion filed October 19, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00746-CR

ROBERT GONZALES RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 85th Judicial District
Brazos County, Texas
Trial Court Cause No. 25,965-85

O P I N I O N

Over his plea of not guilty, a jury found appellant, Robert Gonzales Rodriguez, guilty of the felony offense of aggravated sexual assault of a child. *See* TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i) (Vernon Supp. 2000). The jury assessed appellant's punishment at ten years' confinement and a fine of $10,000. The jury recommended a probated sentence, which was incorporated into the judgment. Appellant appeals his conviction on two points of error. We affirm the trial court's judgment because both legally and factually sufficient evidence support appellant's conviction.

FACTUAL BACKGROUND

On February 10, 1998, about two weeks after his divorce from Lydia Casteneda, his wife of twenty-two years, appellant, Robert Gonzales Rodriguez, spent the better part of the day at his home with his sixteen year-old son, R.R. Two of R.R.'s fifteen year old female friends were also present, one of whom was R.R.'s girlfriend. This being a school day, appellant assisted the children in skipping school. He provided them with alcohol during the day and again in the evening. That night, Casteneda went to appellant's home (formerly the marital home of Casteneda and appellant) to locate their sixteen year old son, R.R. As she approached the house, she heard noises that indicated sexual activity was occurring in her son's bedroom. She proceeded to unlock the front door with her house-key and rushed to R.R.'s bedroom. The record is unclear as to whether she forced open the door after yelling for the person inside to open it (whom she suspected to be R.R.), or went back outside and climbed in through the bedroom window. However, Casteneda testified that once she entered the room she found appellant having sexual intercourse with a fifteen year old girl, which continued even after Casteneda came in the room and began screaming. The girl ("J.W.") remembers nothing of the sexual encounter because, as she testified at trial, she was drunk to the point of being "blacked out." J.W.'s intoxication resulted from drinking the alcohol appellant, a thirty-nine year old adult, provided.

Limited lighting existed in the house that night. The only electricity in the house came from a lamp powered by an extension cord connected to an outlet at a neighboring house. Sparse lighting illuminated the room where Casteneda saw appellant and J.W. having sexual intercourse. Casteneda testified that she did not see appellant's penis on that night, nor did she see actual penetration. Nevertheless, she testified to recognizing appellant, her husband of twenty-two years, "moving on top of" J.W. on the floor of R.R.'s bedroom. Moments later she got into an argument with appellant and she saw J.W. running out of the bedroom into the hall, naked. The only other people in the house at this time were R.R. and his girlfriend, who had locked herself in the master bathroom when all the commotion began.

J.W. could testify to very little that occurred that night due to the fact that she "blacked out" at some point. However, she testified with certainty that she wore under her clothes that night a bra and panties, and those were missing when she came-to at the hospital early the next morning. Furthermore,

R.R. testified that shortly after his mother came on the scene, he saw J.W. crawling on the floor with her pants on backwards pulled up halfway with no panties on. R.R. also testified that appellant was wearing only pants and, possibly, a muscle shirt when he saw him. Officer Damon Oliver testified that during his search of the home, he found, among other things, panties on the floor of the room where the sexual intercourse allegedly occurred.

DISCUSSION AND HOLDINGS

In his two points of error, appellant contends that the evidence is legally and factually insufficient to support his conviction for aggravated sexual assault. In particular, he contends that the State failed either to present any evidence or factually sufficient evidence that he penetrated J.W.'s female sexual organ. We disagree.

When both legal and factual sufficiency points of error are raised, this court must first examine the legal sufficiency of the evidence. *See Clewis v. State* 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict, but we set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis*, 922 S.W.2d at129. To do this, "[t]he court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Since the State bears the burden of proving each element of a criminal offense at trial, an appellant may challenge the sufficiency of the evidence used to establish an element of the offense

by claiming that evidence supporting the adverse finding is "so weak as to be factually insufficient." *Id*. at 11. We are mindful, however, that we must give appropriate deference to the judgment of the fact finder so as to not supplant the fact finder's function as the exclusive judge of the weight and credibility given to witness testimony. *See id*. at 7. Furthermore, the sufficiency of the evidence is not destroyed by contradictions or conflicts between the witnesses' testimony. *See Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App.—Houston [14th Dist.] 1989, writ ref'd). Instead, these things relate solely to the weight of the evidence and the credibility of witnesses as determined by the jury. *See id*. The jury alone resolves conflicting testimony in the record. *See Heiselbetz v. State*, 906 S.W.2d 500, 504 (Tex. Crim. App. 1995). A reviewing court is not at liberty to substitute its conclusions for that of the jury, nor may it interfere with the jury's resolution of conflicts in the evidence. *See id*.

Sexual assault is proven when the State proves beyond a reasonable doubt that the defendant "intentionally or knowingly causes the penetration of the anus or female sexual organ of a child by any means." TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i) (Vernon Supp. 2000). In aggravated sexual assault cases in Texas, a child is "a person younger than 17 years of age who is not the spouse of the actor." *Id*. at § 22.011(c)(1). Penetration of the female sexual organ may be proven by circumstantial evidence. *See Villalon v. State*, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990). Circumstantial evidence is neither less trustworthy nor less probative than direct evidence. *See Jiminez v. State*, 953 S.W.2d 293, 297 (Tex. App.—Austin 1997, no writ). The victim need not testify as to penetration. *See Villalon*, 791 S.W.2d at 133. Furthermore, proof of even the slightest penetration of the victim's female sexual organ is sufficient to sustain a conviction for aggravated sexual assault. *See Malone v. State*, 935 S.W.2d 433, 439 (Tex. App.—Tyler 1996, no writ) (citing *Nilsson v. State*, 477 S.W.2d 592, 595 (Tex. Crim. App. 1972)).

LEGAL SUFFICIENCY

Appellant argues that the evidence is both legally and factually insufficient to prove penetration. He argues legal insufficiency because no one testified as to seeing any penetration or as to the medical results of penetration. J.W. could not have because she was "blacked out" at the time as a result of the alcohol provided to her by appellant. Casteneda testified that she did not see appellant's penis, but that she saw two bodies, appellant on top of J.W., moving in a manner indicating sexual intercourse. Moreover,

immediately thereafter, R.R. saw J.W. crawling on the floor with her pants pulled on only halfway and with no underpants. J.W. testified that she wore underpants that evening. Appellant points to the limited lighting in the house and the contradictions in testimony as to whether Casteneda came through the door to R.R.'s bedroom or the window, and even the influence of the fact that Casteneda and appellant were recently divorced when this incident occurred, to argue that the evidence was insufficient. However, these were all matters for the jury to resolve. "Even when potential inferences raised by evidence are in conflict, we 'must presume that the trier of fact resolved any such conflict in favor of the prosecution and must defer to that resolution.'" *See Malone*, 935 S.W.2d at 437 (quoting *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993)). Nothing in 22.021 requires the State to prove aggravated sexual assault of a child through medical or scientific evidence. *See* TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2000). Thus, applying our deferential standard of review, we conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant committed the offense of aggravated sexual assault of a child. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993).

FACTUAL SUFFICIENCY

Appellant argues factual insufficiency because he contends that since no one testified to penetration, the jury must have based its verdict on bias because of its distaste for the impropriety of all of appellant's actions occurring on February 10, 1998. Though an adult providing alcohol to juveniles, helping them skip school, and being found in a compromising situation with a juvenile is no doubt distasteful, more evidence than just that existed in the record. R.R. testified that J.W. was not wearing panties after the incident, and Casteneda testified as to actually seeing sexual intercourse, and to seeing J.W. naked. This is circumstantial, but not insufficient, evidence of penetration. Thus, the jury's decision was not so contrary to the weight of the evidence as to be manifestly unjust and does not shock the conscience; nor does it clearly demonstrate bias. *See Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). Thus, we hold the evidence supporting the finding of penetration was not so weak as to be factually insufficient. *See Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

C O N C L U S I O N

We find that the evidence was legally and factually sufficient to support the jury's finding of guilt. Accordingly, we affirm the judgment of the trial court.

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Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed October 19, 2000.

Panel consists of Justices Anderson, Fowler and Edelman.

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